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## HOUSE BILL NO. 1038

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee  
on March 11, 2006)

(Patron Prior to Substitute—Delegate Griffith)

A BILL to amend and reenact §§ 19.2-169.3, 19.2-299, 37.2-900, 37.2-903 through 37.2-908, 37.2-910, 37.2-912, 37.2-919, 53.1-136, 53.1-145, and 63.2-105 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 9 of Title 37.2 a section numbered 37.2-920, relating to civil commitment of sexually violent predators.

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 19.2-169.3, 19.2-299, 37.2-900, 37.2-903 through 37.2-908, 37.2-910, 37.2-912, 37.2-919, 53.1-136, 53.1-145, and 63.2-105 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 9 of Title 37.2 a section numbered 37.2-920 as follows:**

§ 19.2-169.3. Disposition of the unrestorably incompetent defendant; capital murder charge; referral to Commitment Review Committee.

A. If, at any time after the defendant is ordered to undergo treatment pursuant to subsection A of § 19.2-169.2, the director of the treating facility concludes that the defendant is likely to remain incompetent for the foreseeable future, he shall send a report to the court so stating. The report shall also indicate whether, in the director's opinion, the defendant should be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, committed pursuant to ~~§ 37.2-908 Chapter 9~~ (§ 37.2-900 et seq.) of Title 37.2, or certified pursuant to § 37.2-806 in the event he is found to be unrestorably incompetent. Upon receipt of the report, the court shall make a competency determination according to the procedures specified in subsection E of § 19.2-169.1. If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, it shall order that he be (i) released, (ii) committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, (iii) reviewed for commitment pursuant to ~~§ 37.2-905 Chapter 9~~ (§ 37.2-900 et seq.) of Title 37.2, or (iv) certified pursuant to § 37.2-806. If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § 19.2-169.2.

B. At the end of six months from the date of the defendant's initial admission under subsection A of § 19.2-169.2 if the defendant remains incompetent in the opinion of the director, the director shall so notify the court and make recommendations concerning disposition of the defendant as described above. The court shall hold a hearing according to the procedures specified in subsection E of § 19.2-169.1 and, if it finds the defendant unrestorably incompetent, shall order one of the dispositions described above. If the court finds the defendant incompetent but restorable to competency, it may order continued treatment under subsection A of § 19.2-169.2 for additional six-month periods, provided a hearing pursuant to subsection E of § 19.2-169.1 is held at the completion of each such period and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

C. Unless an incompetent defendant is charged with capital murder or the charges against an incompetent criminal defendant have been previously dismissed, charges against an unrestorably incompetent defendant shall be dismissed on the date upon which his sentence would have expired had he been convicted and received the maximum sentence for the crime charged, or on the date five years from the date of his arrest for such charges, whichever is sooner.

D. If the court orders an unrestorably incompetent defendant to be reviewed for commitment pursuant to ~~§ 37.2-905~~ § 37.2-904, it shall order the attorney for the Commonwealth in the jurisdiction wherein the defendant was charged and the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services to provide the ~~Attorney General~~ *Commitment Review Committee established pursuant to § 37.2-902* with any information relevant to the review, including, but not limited to: (i) a copy of the warrant or indictment, (ii) a copy of the defendant's criminal record, (iii) information about the alleged crime, (iv) a copy of the competency report completed pursuant to § 19.2-169.1, and (v) a copy of the report prepared by the director of the defendant's treating facility pursuant to this section. The court shall further order that the defendant be held in the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for secure confinement and treatment until the *Commitment Review Committee's* and Attorney General's review and any subsequent hearing or trial are completed. If the court receives notice that the Attorney General has declined to file a petition for the commitment of an unrestorably incompetent defendant as a sexually violent predator after conducting a review pursuant to § 37.2-905, the court shall order that the defendant be released, committed pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2,

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60 or certified pursuant to § 37.2-806.

61 E. In any case when an incompetent defendant is charged with capital murder, notwithstanding any  
62 other provision of this section, the charge shall not be dismissed and the court having jurisdiction over  
63 the capital murder case may order that the defendant receive continued treatment under subsection A of  
64 § 19.2-169.2 for additional six-month periods without limitation, provided that (i) a hearing pursuant to  
65 subsection E of § 19.2-169.1 is held at the completion of each such period, (ii) the defendant remains  
66 incompetent, (iii) the court finds continued treatment to be medically appropriate, and (iv) the defendant  
67 presents a danger to himself or others.

68 F. The attorney for the Commonwealth may bring charges that have been dismissed against the  
69 defendant when he is restored to competency.

70 § 19.2-299. Investigations and reports by probation officers in certain cases.

71 A. Unless waived by the court and the defendant and the attorney for the Commonwealth, when a  
72 person is tried in a circuit court (i) upon a charge of assault and battery in violation of § 18.2-57 or  
73 18.2-57.2, stalking in violation of § 18.2-60.3, sexual battery in violation of § 18.2-67.4, attempted  
74 sexual battery in violation of § 18.2-67.5, or driving while intoxicated in violation of § 18.2-266, and is  
75 adjudged guilty of such charge, the court may, or on motion of the defendant shall; or (ii) upon a felony  
76 charge not set forth in subdivision (iii) below, the court may when there is a plea agreement between  
77 the defendant and the Commonwealth and shall when the defendant pleads guilty without a plea  
78 agreement or is found guilty by the court after a plea of not guilty; or (iii) the court shall when a person  
79 is charged and adjudged guilty of a felony violation, or conspiracy to commit or attempt to commit a  
80 felony violation, of § 18.2-46.2, 18.2-46.3, 18.2-48, 18.2-61, 18.2-63, 18.2-64.1, 18.2-64.2, 18.2-67.1,  
81 18.2-67.2, 18.2-67.3, 18.2-67.4:1, 18.2-67.5:1, 18.2-355, 18.2-356, 18.2-357, 18.2-361, 18.2-362,  
82 18.2-366, 18.2-368, 18.2-370, 18.2-370.1, or 18.2-370.2, or any attempt to commit or conspiracy to  
83 commit any felony violation of § 18.2-67.5, 18.2-67.5:2, or 18.2-67.5:3, direct a probation officer of  
84 such court to thoroughly investigate and report upon the history of the accused, including a report of the  
85 accused's criminal record as an adult and available juvenile court records, any information regarding the  
86 accused's participation or membership in a criminal street gang as defined in § 18.2-46.1, and all other  
87 relevant facts, to fully advise the court so the court may determine the appropriate sentence to be  
88 imposed. The probation officer, after having furnished a copy of this report at least five days prior to  
89 sentencing to counsel for the accused and the attorney for the Commonwealth for their permanent use,  
90 shall submit his report in advance of the sentencing hearing to the judge in chambers, who shall keep  
91 such report confidential. Counsel for the accused may provide the accused with a copy of the  
92 presentence report. The probation officer shall be available to testify from this report in open court in  
93 the presence of the accused, who shall have been provided with a copy of the presentence report by his  
94 counsel or advised of its contents and be given the right to cross-examine the investigating officer as to  
95 any matter contained therein and to present any additional facts bearing upon the matter. The report of  
96 the investigating officer shall at all times be kept confidential by each recipient, and shall be filed as a  
97 part of the record in the case. Any report so filed shall be made available only by court order and shall  
98 be sealed upon final order by the court, except that such reports or copies thereof shall be available at  
99 any time to any criminal justice agency, as defined in § 9.1-101, of this or any other state or of the  
100 United States; to any agency where the accused is referred for treatment by the court or by probation  
101 and parole services; and to counsel for any person who has been indicted jointly for the same felony as  
102 the person subject to the report. Any report prepared pursuant to the provisions hereof shall without  
103 court order be made available to counsel for the person who is the subject of the report if that person is  
104 charged with a felony subsequent to the time of the preparation of the report. The presentence report  
105 shall be in a form prescribed by the Department of Corrections. In all cases where such report is not  
106 ordered, a simplified report shall be prepared on a form prescribed by the Department of Corrections.  
107 For the purposes of this subsection, information regarding the accused's participation or membership in a  
108 criminal street gang may include the characteristics, specific rivalries, common practices, social customs  
109 and behavior, terminology, and types of crimes that are likely to be committed by that criminal street  
110 gang.

111 B. As a part of any presentence investigation conducted pursuant to subsection A when the offense  
112 for which the defendant was convicted was a felony, the court probation officer shall advise any victim  
113 of such offense in writing that he may submit to the Virginia Parole Board a written request (i) to be  
114 given the opportunity to submit to the Board a written statement in advance of any parole hearing  
115 describing the impact of the offense upon him and his opinion regarding the defendant's release and (ii)  
116 to receive copies of such other notifications pertaining to the defendant as the Board may provide  
117 pursuant to subsection B of § 53.1-155.

118 C. As part of any presentence investigation conducted pursuant to subsection A when the offense for  
119 which the defendant was convicted was a felony drug offense set forth in Article 1 (§ 18.2-247 et seq.)  
120 of Chapter 7 of Title 18.2, the presentence report shall include any known association of the defendant  
121 with illicit drug operations or markets.

D. As a part of any presentence investigation conducted pursuant to subsection A, when the offense for which the defendant was convicted was a felony, not a capital offense, committed on or after January 1, 2000, the defendant shall be required to undergo a substance abuse screening pursuant to § 18.2-251.01.

§ 37.2-900. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Defendant" means any person charged with a sexually violent offense who is deemed to be an unrestorably incompetent defendant pursuant to § 19.2-169.3 and is referred for commitment review pursuant to § 37.2-905 *this chapter*.

"Director" means the Director of the Department of Corrections.

"Mental abnormality" or "personality disorder" means a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others.

"Sexually violent offense" means (i) a felony conviction under former § 18-54, former § 18.1-44, § 18.2-61, 18.2-67.1, 18.2-67.2; (ii) a conviction under § 18.2-48 (ii), 18.2-48 (iii), 18.2-63, 18.2-64.1, or 18.2-67.3 where the complaining witness is less than 13 years of age; or (iii) a felony conviction under the laws of the Commonwealth for a forcible sexual offense committed prior to July 1, 1981, where the criminal behavior on which the conviction is based is set forth in § 18.2-67.1 or 18.2-67.2, or is set forth in § 18.2-67.3 where the complaining witness is less than 13 years of age; or (iv) a felony conviction for conspiracy to commit or attempt to commit any of the above offenses.

"Sexually violent predator" means any person who (i) has been convicted of a sexually violent offense or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial pursuant to § 19.2-169.3 and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.

§ 37.2-903. Treatment plans; database of prisoners convicted of sexually violent offenses; maintained by Department of Corrections; notice of pending release to CRC.

A. The Director shall establish and maintain a treatment program for prisoners convicted pursuant to Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2 and committed to the custody of the Department of Corrections. This program shall include a clinical assessment of all such prisoners upon receipt into the custody of the Department of Corrections and the development of appropriate treatment plans, if indicated. This program shall be operated under the direction of a licensed psychiatrist or licensed clinical psychologist who is experienced in the diagnosis and treatment of mental abnormalities and disorders associated with criminal sexual offenders.

B. The Director shall establish and maintain a database of prisoners ~~each prisoner~~ in his custody who ~~are~~ *is* (i) incarcerated for a sexually violent ~~offenses~~ *offense* or (ii) serving or will serve concurrent or consecutive time for ~~other offenses~~ *another offense* in addition to time for a sexually violent offense. The database shall include the following information regarding each prisoner: (a) the prisoner's criminal record and (b) the prisoner's sentences and scheduled date of release. A prisoner who is serving or will serve concurrent or consecutive time for other offenses in addition to his time for a sexually violent offense, shall remain in the database until such time as he is released from the custody or supervision of the Department of Corrections or Virginia Parole Board for all of his charges. *Prior to the initial assessment of a prisoner under subsection C, the Director shall order a national criminal history records check to be conducted on the prisoner.*

C. Each month, the Director shall review the database and identify all such prisoners who are scheduled for release from prison within 10 months from the date of such review who receive a score of ~~four~~ *five* or more on the ~~Rapid Risk Assessment for Sexual Offender Recidivism Static-99~~ or a like score on a comparable, scientifically validated instrument designated by the Commissioner, *or a score of four on the Static-99 or a like score on a comparable, scientifically validated instrument if the sexually violent offense mandating the prisoner's evaluation under this section was a violation of (a) clause (iii) of subsection A of § 18.2-61; (b) subdivision A 1 of § 18.2-67.1; (c) subdivision A 1 of § 18.2-67.2; (d) subdivision A 1 of § 67.3 where the victim was under the age of 13 and suffered physical bodily injury; or (e) subdivision A 1 of § 67.3 where any initial warrant, indictment, information, presentment, petition, summons, or other charging document for the offense was for a violation of § 18.2-61, 18.2-67.1, or 18.2-67.2.*

D. *If the Director and the Commissioner agree that no specific scientifically validated instrument exists to measure the risk assessment of a prisoner, the prisoner may instead be evaluated by a licensed psychiatrist or licensed clinical psychologist for an initial determination of whether or not the prisoner may meet the definition of a sexually violent predator.*

E. Upon the identification of such prisoners, the Director shall forward their names, their scheduled dates of release, and copies of their files to the CRC for assessment.

§ 37.2-904. CRC assessment of prisoners or incompetent defendants eligible for commitment as

183 sexually violent predators; mental health examination; recommendation.

184 A. Within 90 days of receiving notice from the Director pursuant to § 37.2-903 regarding a prisoner  
185 who is in the database, *or from a court referring an incompetent defendant pursuant to § 19.2-169.3*, the  
186 CRC shall (i) complete its assessment of the prisoner *or defendant* for possible commitment pursuant to  
187 subsection B and (ii) forward its written recommendation regarding the prisoner to the Attorney General  
188 pursuant to subsection C.

189 B. CRC assessments of eligible prisoners *or incompetent defendants* shall include a mental health  
190 examination, including a personal interview, of the prisoner *or incompetent defendant* by a licensed  
191 psychiatrist or a licensed clinical psychologist who is designated by the Commissioner, skilled in the  
192 diagnosis and treatment of mental abnormalities and disorders associated with ~~violent~~ sex offenders, and  
193 not a member of the CRC. *If the prisoner's or defendant's name was forwarded to the CRC based upon*  
194 *an evaluation by a licensed psychiatrist or licensed clinical psychologist, a different licensed psychiatrist*  
195 *or licensed clinical psychologist shall perform the examination for the CRC.* The licensed psychiatrist or  
196 licensed clinical psychologist shall determine whether the prisoner *or incompetent defendant* is a  
197 sexually violent predator, as defined in § 37.2-900, and forward the results of this evaluation and any  
198 supporting documents to the CRC for its review.

199 The CRC assessment shall also include:

200 ~~consideration~~ 1. *Consideration* of the prisoner's score on the ~~Rapid Risk Assessment for Sexual~~  
201 ~~Offender Recidivism Static-99~~ or a comparable, scientifically validated instrument designated by the  
202 Commissioner; and

203 a 2. A review of (i) the prisoner's *or incompetent defendant's* institutional history and treatment  
204 record, if any; (ii) ~~the prisoner's~~ *his* criminal background; and (iii) any other factor that is relevant to the  
205 determination of whether ~~the prisoner~~ *he* is a sexually violent predator.

206 Notwithstanding § 19.2-299.1 or any other provision of law, the CRC is authorized to possess, copy,  
207 and use presentence reports, postsentence reports, and victim impact statements for all lawful purposes.

208 C. Following the examination and review ~~of a prisoner~~ conducted pursuant to subsection B, the CRC  
209 shall recommend that the prisoner *or incompetent defendant* (i) be committed as a sexually violent  
210 predator pursuant to this chapter; (ii) not be committed, but be placed in a conditional release program  
211 as a less restrictive alternative; or (iii) not be committed because he does not meet the definition of a  
212 sexually violent predator. To assist the Attorney General in his review, the Department of Corrections,  
213 the CRC, and the psychiatrist or psychologist who conducts the mental health examination pursuant to  
214 this section shall provide the Attorney General with all evaluation reports, prisoner records, criminal  
215 records, medical files, and any other documentation relevant to determining whether a prisoner *or*  
216 *incompetent defendant* is a sexually violent predator.

217 D. Pursuant to clause (ii) of subsection C, the CRC shall recommend that a prisoner *or incompetent*  
218 *defendant* enter a conditional release program if it finds that (i) ~~the prisoner~~ *he* does not need inpatient  
219 treatment, but needs outpatient treatment and monitoring to prevent his condition from deteriorating to a  
220 degree that he would need inpatient treatment; (ii) appropriate outpatient supervision and treatment are  
221 reasonably available; (iii) there is significant reason to believe that ~~the prisoner~~, if conditionally released,  
222 *he* would comply with the conditions specified; and (iv) conditional release will not present an undue  
223 risk to public safety.

224 E. Notwithstanding any other provision of law, all state and local courts, clerks, departments,  
225 agencies, boards, and commissions shall provide to the CRC all requested records, documents, notes,  
226 recordings, or other information of any kind, including presentence or postsentence reports, victim  
227 impact statements, and child abuse registry records, within 20 days of receiving such request.

228 F. Notwithstanding any other provision of law, any mental health professional employed or appointed  
229 pursuant to subsection B or § 37.2-907 shall be permitted to copy and possess any presentence or  
230 postsentence reports and victim impact statements for use in examinations, creating reports, and  
231 testifying in any proceedings pursuant to this article. However, at the conclusion of the examiner's  
232 testimony or service in such proceedings, the examiner shall return all presentence reports, postsentence  
233 reports and victim impact statements to the Office of the Attorney General.

234 G. Any mental health professional appointed or employed pursuant to subsection B or § 37.2-907  
235 shall be permitted to testify at the probable cause hearing and at the trial as to his diagnosis, his opinion  
236 as to whether the prisoner *or incompetent defendant* meets the definition of a sexually violent predator,  
237 his recommendation as to treatment and his reasoning therefor. Such opinion shall not be dispositive of  
238 whether the person is a sexually violent predator.

239 H. *If the CRC deems it necessary to have the services of additional experts in order to complete its*  
240 *review of the prisoner, the Commissioner shall appoint such qualified experts as are needed.*

241 § 37.2-905. Review of prisoners convicted of a sexually violent offense; review of unrestorably  
242 incompetent defendants charged with sexually violent offenses; petition for commitment; notice to  
243 Department of Corrections or referring court regarding disposition of review.

244 A. Upon receipt of a recommendation by the CRC regarding an eligible prisoner or ~~upon receipt of a~~

court order referring an unrestorably incompetent defendant for review pursuant to § 19.2-169.3, the Attorney General shall have 90 days to conduct a review of the prisoner or defendant and (i) file a petition for the civil commitment of the prisoner or defendant as a sexually violent predator and stating sufficient facts to support such allegation or (ii) notify the Director and Commissioner, in the case of a prisoner, or the referring court and the Commissioner, in the case of an unrestorably incompetent defendant, that he will not file a petition for commitment. Petitions for commitment shall be filed in the circuit court in which the prisoner was last convicted of a sexually violent offense or in which the defendant was deemed unrestorably incompetent and referred for commitment review pursuant to § 19.2-169.3.

B. In determining whether to file a petition to civilly commit a prisoner under this chapter, the Attorney General shall review (i) the CRC recommendation and its reasoning; (ii) the results of the mental health examination conducted pursuant to § 37.2-904; (iii) the prisoner's institutional history and treatment record, if any; (iv) the prisoner's criminal offense history; and (v) any other factor relevant to the determination of whether the prisoner should be civilly committed. Although the Attorney General shall consider the CRC recommendation as part of the review, the CRC recommendation is not binding upon the Attorney General.

C. In determining whether to file a petition to civilly commit a defendant under this chapter, the Attorney General shall review (i) *the CRC recommendation and its reasoning*, (ii) the defendant's warrant or indictment, ~~(ii)~~ (iii) the competency report completed pursuant to § 19.2-169.1, ~~(iii)~~ (iv) the report and recommendations prepared by the director of the defendant's treating facility pursuant to § 19.2-169.3, ~~(iv)~~ (v) *the mental health evaluation completed pursuant to § 37.2-904*, (vi) the defendant's criminal offense history, ~~(v)~~ (vii) information about the alleged crime, ~~(vi)~~ and (viii) any other factor relevant to the determination of whether the defendant should be civilly committed, ~~and (vii) the mental health evaluation performed pursuant to subsection E.~~

D. Notwithstanding § 19.2-299.1 or any other provision of law, the Attorney General is authorized to possess, copy, and use presentence reports, postsentence reports, and victim impact statements for all lawful purposes.

E. ~~Whenever a court refers an incompetent defendant to the Attorney General for review, the court shall also appoint a licensed psychiatrist or licensed clinical psychologist from the list maintained by the Commissioner pursuant to subsection B of § 37.2-904 to conduct a mental health evaluation, including a personal interview, of the incompetent defendant. The licensed psychiatrist or licensed clinical psychologist shall determine whether the incompetent defendant is a sexually violent predator as defined in § 37.2-900 and shall forward the results of this evaluation and any supporting documents to the Attorney General within 45 days of his appointment.~~

*If the Attorney General decides not to file a petition for the civil commitment of a prisoner or incompetent defendant, or if a petition is filed but is dismissed for any reason, and the prisoner or incompetent defendant has outstanding probation or parole time to serve, the Attorney General and the Director may share any relevant information with the probation and parole officer to the extent allowed by state and federal law.*

§ 37.2-906. Probable cause hearing.

A. Upon the filing of a petition alleging that a person is a sexually violent predator, the circuit court shall (i) forthwith order that until a final order is entered in the proceeding, in the case of a prisoner, he remain in the secure custody of the Department of Corrections or, in the case of a defendant, he remain in the secure custody of the Department and (ii) schedule a hearing within 60 days to determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. *A continuance extending the case beyond the 60 days may be granted to either the Attorney General or the person who is the subject of the petition only upon good cause shown.* A copy of the petition shall be mailed by the clerk to the attorney appointed or retained for the person named in the petition and, in those cases in which the person named in the petition is a prisoner, to the warden or superintendent of the correctional facility in which the person is then confined. The warden or superintendent shall cause the petition to be delivered to the person and shall certify the delivery to the clerk. In addition, a written explanation of the sexually violent predator involuntary commitment process and the statutory protections associated with the process shall be given to the person at the time the petition is delivered.

B. Prior to any hearing under this section, the judge shall ascertain if the person whose commitment is sought is represented by counsel and, if he is not represented by counsel, the judge shall appoint an attorney to represent him. However, if the person requests an opportunity to employ counsel, the court shall give him a reasonable opportunity to employ counsel at his own expense.

C. At the probable cause hearing, the judge shall (i) verify the person's identity and (ii) determine whether probable cause exists to believe that the person is a sexually violent predator. In the case of a prisoner in the custody of the Department of Corrections, if the judge finds that there is not probable cause to believe that the person is a sexually violent predator, the judge shall dismiss the petition, and

306 the person shall remain in the custody of the Department of Corrections until his scheduled date of  
307 release from prison. In the case of a defendant, if the judge finds that there is not probable cause to  
308 believe the defendant is a sexually violent predator, the judge shall dismiss the petition and order that  
309 the defendant be discharged, involuntarily admitted pursuant to §§ 37.2-814 through 37.2-819, or  
310 certified for admission pursuant to § 37.2-806.

311 § 37.2-907 Right to assistance of experts; compensation.

312 A. Any person who is the subject of a petition under this chapter shall have, prior to trial, the right  
313 to employ experts at his own expense to perform examinations and testify on his behalf. However, if a  
314 person has not employed an expert and requests expert assistance, the judge shall appoint such experts  
315 as he deems necessary to perform examinations and participate in the trial on the person's behalf. Any  
316 expert appointed to assist the person on matters relating to the person's mental health, including  
317 examination, evaluation, diagnosis, and treatment, shall have the qualifications required by subsection B  
318 of § 37.2-904. Any expert employed to assist the person on matters relating to the person's mental health  
319 shall be a licensed psychiatrist or licensed clinical psychologist who is skilled in the diagnosis and  
320 treatment of mental abnormalities and disorders associated with violent sex offenders and who is not a  
321 member of the CRC. Any expert employed or appointed pursuant to this section shall have reasonable  
322 access to all relevant medical and psychological records and reports pertaining to the person he has been  
323 employed or appointed to assist.

324 B. Each psychiatrist, psychologist, or other expert appointed by the court to render professional  
325 service pursuant to this chapter who is not regularly employed by the Commonwealth, except by the  
326 University of Virginia School of Medicine and the Virginia Commonwealth University School of  
327 Medicine, shall receive a reasonable fee for such service. The fee shall be determined in each instance  
328 by the court that appointed the expert, in accordance with guidelines established by the Supreme Court  
329 after consultation with the Department. The fee shall not exceed \$5,000. However, in addition, if any  
330 such expert is required to appear as a witness in any hearing held pursuant to this chapter, he shall  
331 receive mileage and a fee of \$750 for each day during which he is required to serve. An itemized  
332 account of expenses, duly sworn to, must be presented to the court, and, when allowed, shall be certified  
333 to the Supreme Court for payment out of the state treasury, and shall be charged against the  
334 appropriations made to pay criminal charges. Allowance for the fee and for the per diem authorized  
335 shall also be made by order of the court, duly certified to the Supreme Court, for payment out of the  
336 appropriation to pay criminal charges.

337 § 37.2-908. Trial; right to trial by jury; standard of proof; discovery.

338 A. Within 90 days after the completion of the probable cause hearing held pursuant to § 37.2-906,  
339 the court shall conduct a trial to determine whether the person who is the subject of the petition is a  
340 sexually violent predator. *A continuance extending the case beyond the 90 days may be granted to either*  
341 *the Attorney General or the person who is the subject of the petition only upon good cause shown.*

342 B. The Attorney General or the person who is the subject of the petition shall have the right to a  
343 trial by jury. Seven persons from a panel of 13 shall constitute a jury in such cases. If a jury determines  
344 a person to be a sexually violent predator, a unanimous verdict shall be required. If no demand is made  
345 by either party for a trial by jury, the trial shall be before the court.

346 C. The court or jury shall determine whether, by clear and convincing evidence, the person who is  
347 the subject of the petition is a sexually violent predator. If the court or jury does not find clear and  
348 convincing evidence that the person is a sexually violent predator, the court shall, in the case of a  
349 prisoner, direct that he be returned to the custody of the Department of Corrections. The Department of  
350 Corrections shall immediately release him if his scheduled release date has passed, or hold him until his  
351 scheduled release date. In the case of a defendant, if the court or jury does not find by clear and  
352 convincing evidence that the defendant is a sexually violent predator, the court shall order that the  
353 defendant be discharged, involuntarily admitted pursuant to §§ 37.2-814 through 37.2-819, or certified  
354 for admission pursuant to § 37.2-806.

355 D. If the court or jury finds the person to be a sexually violent predator, the court shall then  
356 determine whether the person shall be fully committed or placed on conditional release. *In making its*  
357 *determination, the court shall consider (i) the nature and circumstances of the sexually violent offense*  
358 *for which the person was charged or convicted, including the age and maturity of the victim; (ii) the*  
359 *results of any actuarial test, including the likelihood of recidivism; (iii) the results of any diagnostic*  
360 *tests previously administered to the person under this chapter; (iv) the person's mental history, including*  
361 *treatments for mental illness or mental disorders, participation in and response to therapy or treatment,*  
362 *and any history of previous hospitalizations; (v) the person's present mental condition; (vi) the person's*  
363 *disciplinary record and types of infractions he may have committed while incarcerated or hospitalized;*  
364 *(vii) the person's living arrangements and potential employment if he were to be placed on conditional*  
365 *release; (viii) the availability of transportation and appropriate supervision to ensure participation by*  
366 *the person in necessary treatment; and (ix) any other factors that the court deems relevant.* If the court  
367 finds, in its determination of treatment needs, that alternatives to involuntary secure inpatient treatment

have been investigated and deemed unsuitable and there is no less restrictive alternative to involuntary secure inpatient treatment, the judge shall by written order and specific findings so certify and order that the person be committed to the custody of the Department for appropriate inpatient treatment in a secure facility designated by the Commissioner. Persons committed pursuant to this chapter are subject to the provisions of § 19.2-174.1 and Chapter 11 (§ 37.2-1100 et seq.).

E. If the court determines not to order full commitment, the court shall continue the case for not less than 30 days *nor more than 60 days* and shall require the Commissioner to submit a report to the court, the Attorney General, and counsel for the person suggesting possible alternatives to full commitment. The court shall then reconvene the hearing and receive testimony on the possible alternatives to full commitment. At the conclusion of the hearing, if the court finds, in determining the treatment needs of a person found to be a sexually violent predator, that less restrictive alternatives to involuntary secure inpatient treatment have been investigated and are deemed suitable, *and that any such alternatives will be able to accommodate needed and appropriate supervision and treatment plans for the person, including but not limited to, therapy or counseling, access to medications, availability of travel, location of residence, and regular psychological monitoring of the person if appropriate, including polygraph examinations, penile plethysmograph testing, or sexual interest testing, if necessary.* ~~and if~~ Access to anti-androgen medications or other medication prescribed to lower blood serum testosterone shall not be used as a primary reason for determining that less restrictive alternatives are appropriate pursuant to this chapter. If the judge finds specifically that the person meets the criteria for conditional release set forth in § 37.2-912, the judge shall order outpatient treatment, day treatment in a hospital, night treatment in a hospital, outpatient involuntary treatment with anti-psychotic medication pursuant to Chapter 11 (§ 37.2-1100 et seq.), or such other appropriate course of treatment as may be necessary to meet the needs of the individual. *The court shall also order the person to be subject to electronic monitoring of his location by means of a GPS (Global Positioning System) tracking device, or other similar device, at all times while he is on conditional release.*

F. The Department shall recommend a specific course of treatment and programs for provision of such treatment and shall monitor the person's compliance with such treatment as may be ordered by the court under this section, unless the person is on parole or probation, in which case the parole or probation officer shall monitor the person's compliance. The person's failure to comply with involuntary outpatient treatment as ordered by the court may be admitted into evidence in subsequent hearings held pursuant to the provisions of this chapter. Upon failure of the person to adhere to the terms of the involuntary outpatient treatment, the judge may revoke the same and, upon notice to the person undergoing involuntary outpatient treatment and after a hearing, order the person committed as a sexually violent predator for inpatient treatment at a secure facility designated by the Commissioner.

G. In the event of a mistrial, the court shall direct that the prisoner remain in the secure custody of the Department of Corrections or the defendant remain in the secure custody of the Department until another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial.

H. All proceedings conducted hereunder are civil proceedings. However, no discovery other than that provided in § 37.2-901 shall be allowed without prior leave of the court, which may deny or limit discovery in any such proceeding. No less than 30 days prior to the trial of the matter, any expert employed or appointed pursuant to § 37.2-907 shall prepare a written report detailing his findings and conclusions and shall submit the report, along with all supporting data, to the court, the Attorney General, and counsel for the person. Under no circumstances shall the prisoner or defendant be entitled to receive a copy of the victim impact statement or the presentence investigation report. However, counsel for the prisoner or defendant and any expert employed or appointed pursuant to § 37.2-907 may review the victim impact statement or presentence investigation report outside the presence of the prisoner or defendant. The Attorney General shall file with the clerk copies of any relevant presentence reports, postsentence reports, and victim impact statements in his possession, withholding identifying information about victims. Such filings shall be held by the court in confidence and reviewable only by the court, the Attorney General, and the counsel for the prisoner or defendant pursuant to this section possess and copy the victim impact statement or presentence or postsentence report for use at the trial. Within 30 days after the case is finally disposed of, counsel for the prisoner or defendant and any expert employed or appointed pursuant to § 37.2-907 shall return all copies of the victim impact statements and presentence and postsentence reports to the Attorney General. However, in no event shall the prisoner or defendant be permitted to possess or copy a victim impact statement or presentence or postsentence report.

§ 37.2-910. Review of continuation of secure inpatient treatment hearing; procedure and reports; disposition.

A. The committing court shall conduct a hearing 12 months after the date of commitment to assess each committed person's need for secure inpatient treatment. A hearing for assessment shall be

429 conducted at yearly intervals for five years and at biennial intervals thereafter. The court shall schedule  
430 the matter for hearing as soon as possible after it becomes due, giving the matter priority over all  
431 pending matters before the court.

432 B. Prior to the hearing, the Commissioner shall provide to the court a report reevaluating the  
433 committed person's condition and recommending treatment. The report shall be prepared by a licensed  
434 psychiatrist or a licensed clinical psychologist skilled in the diagnosis and treatment of mental  
435 abnormalities and personality disorders associated with violent sex offenders and qualified by training  
436 and experience to perform forensic evaluations. If the Commissioner's report recommends discharge or  
437 the committed person requests discharge, the committed person's condition and need for secure inpatient  
438 treatment shall be evaluated by a second person with such credentials who is not currently treating the  
439 committed person. Any professional person who conducts a second evaluation of a committed person  
440 shall submit a report of his findings to the court and the Commissioner. A copy of any report submitted  
441 pursuant to this subsection shall be sent to the Attorney General.

442 C. The burden of proof at the hearing shall be upon the Commonwealth to prove to the court by  
443 clear and convincing evidence that the committed person remains a sexually violent predator.

444 D. If the court finds, based upon the report and other evidence provided at the hearing, that the  
445 committed person's condition has so changed that he person is no longer a sexually violent predator, the  
446 court shall (i) release the committed person from secure inpatient treatment if he does not need it and  
447 does not meet the criteria for conditional release set forth in § 37.2-912, provided the court has approved  
448 a discharge plan prepared by the Department or (ii) place the committed person on conditional release if  
449 he meets the criteria for conditional release and the court has approved a conditional release plan  
450 prepared by the Department. However, if . If the court finds that the committed person remains a  
451 sexually violent predator, it shall order that he remain in the custody of the Commissioner for secure  
452 inpatient hospitalization and treatment or that he be conditionally released. To determine if the  
453 committed person shall be conditionally released, the court shall determine if the person meets the  
454 criteria for conditional release set forth in § 37.2-912. If the court orders that the person be  
455 conditionally released, the court shall allow the Department no less than 30 days and no more than 60  
456 days to prepare a conditional release plan. Any such plan must be able to accommodate needed and  
457 appropriate supervision and treatment plans for the person, including but not limited to, therapy or  
458 counseling, access to medications, availability of travel, location of residence, and regular psychological  
459 monitoring of the person if called for, including polygraph examinations, penile plethysmograph testing,  
460 or sexual interest testing, if necessary. Access to anti-androgen medications or other medication  
461 prescribed to lower blood serum testosterone shall not be used as a primary reason for determining that  
462 less restrictive alternatives are appropriate pursuant to this chapter.

463 If the court places the person on conditional release, the court shall order the person to be subject  
464 to electronic monitoring of his location by means of a GPS (Global Positioning System) tracking device,  
465 or other similar device, at all times while he is on conditional release.

466 § 37.2-912. Conditional release; criteria; conditions; reports.

467 A. At any time the court considers the committed person's need for secure inpatient treatment  
468 pursuant to this chapter, it shall place the committed person on conditional release if it finds that (i)  
469 based on consideration of the factors that the court must consider in its commitment decision, he does  
470 not need secure inpatient treatment but needs outpatient treatment or monitoring to prevent his condition  
471 from deteriorating to a degree that he would need secure inpatient treatment; (ii) appropriate outpatient  
472 supervision and treatment are reasonably available; (iii) there is significant reason to believe that the  
473 committed person, if conditionally released, would comply with the conditions specified; and (iv)  
474 conditional release will not present an undue risk to public safety. In making its determination, the court  
475 shall consider (i) the nature and circumstances of the sexually violent offense for which the person was  
476 charged or convicted, including the age and maturity of the victim; (ii) the results of any actuarial test,  
477 including the likelihood of recidivism; (iii) the results of any diagnostic tests previously administered to  
478 the person under this chapter; (iv) the person's mental history, including treatments for mental illness or  
479 mental disorders, participation in and response to therapy or treatment, and any history of previous  
480 hospitalizations; (v) the person's present mental condition; (vi) the person's response to treatment while  
481 in secure inpatient treatment or on conditional release, including his disciplinary record and any  
482 infractions; (vii) the person's living arrangements and potential employment if he were to be placed on  
483 conditional release; (viii) the availability of transportation and appropriate supervision to ensure  
484 participation by the person in necessary treatment; and (ix) any other factors that the court deems  
485 relevant. The court shall subject a conditionally released committed person to the orders and conditions  
486 it deems will best meet the committed person's need for treatment and supervision and best serve the  
487 interests of justice and society. In all cases of conditional release, the court shall order the person to be  
488 subject to electronic monitoring of his location by means of a GPS (Global Positioning System) tracking  
489 device, or other similar device, at all times while he is on conditional release.

490 The Department or, if the person is on parole or probation, the person's parole or probation officer



shall implement the court's conditional release orders and shall submit written reports to the court on the committed person's progress and adjustment in the community no less frequently than every six months. The Department or, if the person is on parole or probation, the person's parole or probation officer shall send a copy of each written report submitted to the court and copies of all correspondence with the court pursuant to this section to the Attorney General and the Commissioner.

B. Notwithstanding any other provision of law, when any person is placed on conditional release under this article, the Department of Corrections shall provide to the Department of Mental Health, Mental Retardation and Substance Abuse Services, or if the person is on parole or probation, the person's parole or probation officer, all relevant criminal history information, medical and mental health records, presentence and postsentence reports and victim impact statements, and the mental health evaluations performed pursuant to subsection B of § 37.2-904 and § 37.2-907, for use in the management and treatment of the person placed on conditional release. Any information or document provided pursuant to this subsection shall not be subject to disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

§ 37.2-919. Postrelease supervision of Department; commission of new criminal offense by person committed to Department.

*A. If a person committed to the Department of Mental Health, Mental Retardation and Substance Abuse Services, whether in involuntary secure inpatient treatment or on conditional release, who is also on probation, parole, or postrelease supervision, fails to comply with any conditions established by the Department, or fails to comply with the terms of a treatment plan, the Department shall so notify the Department of Corrections or the person's probation and parole officer.*

*B. If a person committed to the Department of Mental Health, Mental Retardation and Substance Abuse Services is arrested for a felony or Class 1 or 2 misdemeanor offense, he shall be transported to a judicial officer forthwith for a bond determination in accordance with the provisions of § 19.2-80. If the judicial officer admits the accused to bail, he shall, upon his admission to bail, be immediately transported back into the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services. If, after trial for this offense, no active period of incarceration is imposed, or if the person is acquitted or the charges are withdrawn or dismissed, he shall be returned to the Department of Mental Health, Mental Retardation and Substance Abuse Services pursuant to his commitment. If a period of active incarceration of 12 months or longer is imposed or any suspended sentence is revoked resulting in the person being returned to the Department of Corrections for a period of active incarceration of 12 months or longer, the person shall not be entitled to an annual or biennial review hearing pursuant to § 37.2-910 until 12 months after he has been returned to the custody of the Commissioner. Such reincarceration shall toll the provisions of § 37.2-910.*

*§ 37.2-920. Appeal by Attorney General; emergency custody order.*

*In any case in which the Attorney General successfully appeals the trial court's denial of probable cause, denial of civil commitment or conditional release, or discharge or placement on conditional release after an annual review hearing, upon the issuance of the mandate by the Supreme Court of Virginia, the trial court shall immediately issue an emergency custody order to any local law-enforcement official to have the person taken into custody and held in the local correctional facility, pending further appropriate proceedings.*

*§ 53.1-136. Powers and duties of Board; notice of release of certain inmates.*

In addition to the other powers and duties imposed upon the Board by this article, the Board shall:

1. Adopt, subject to approval by the Governor, general rules governing the granting of parole and eligibility requirements, which shall be published and posted for public review;

2. (a) Release on parole for such time and upon such terms and conditions as the Board shall prescribe, persons convicted of felonies and confined under the laws of the Commonwealth in any correctional facility in Virginia when those persons become eligible and are found suitable for parole, according to those rules adopted pursuant to subdivision 1;

(b) Establish the conditions of postrelease supervision authorized pursuant to §§ 18.2-10 and 19.2-295.2 A;

(c) Notify by certified mail at least 21 business days prior to release on discretionary parole of any inmate convicted of a felony and sentenced to a term of 10 or more years, the attorney for the Commonwealth in the jurisdiction where the inmate was sentenced. In the case of parole granted for medical reasons, where death is imminent, the Commonwealth's Attorney may be notified by telephone or other electronic means prior to release. Nothing in this subsection shall be construed to alter the obligations of the Board under § 53.1-155 for investigation prior to release;

(d) *In any case where a person who is released on parole or postrelease supervision has been committed to the Department of Mental Health, Mental Retardation and Substance Abuse Services under the provisions of Chapter 9 (§ 37.1-900 et seq.) of Title 37.2, the conditions of his parole or postrelease supervision shall include the requirement that the person comply with all conditions given him by the*

552 *Department of Mental Health, Mental Retardation, and Substance Abuse Services, and that he follow all*  
553 *of the terms of his treatment plan;*

554 3. Revoke parole and any period of postrelease and order the reincarceration of any parolee or felon  
555 serving a period of postrelease supervision or impose a condition of participation in any component of  
556 the Statewide Community-Based Corrections System for State-Responsible Offenders (§ 53.1-67.2 et  
557 seq.) on any eligible parolee, when, in the judgment of the Board, he has violated the conditions of his  
558 parole, postrelease supervision or is otherwise unfit to be on parole or on postrelease supervision;

559 4. Issue final discharges to persons released by the Board on parole when the Board is of the opinion  
560 that the discharge of the parolee will not be incompatible with the welfare of such person or of society;

561 5. Make investigations and reports with respect to any commutation of sentence, pardon, reprieve or  
562 remission of fine or penalty when requested by the Governor; and

563 6. Publish monthly a statement regarding the action taken by the Board on the parole of prisoners.  
564 The statement shall list the name of each prisoner considered for parole and indicate whether parole was  
565 granted or denied, as well as the basis for denial of parole as described in subdivision 2 (a).

566 § 53.1-145. Powers and duties of probation and parole officers.

567 In addition to other powers and duties prescribed by this article, each probation and parole officer  
568 shall:

569 1. Investigate and report on any case pending in any court or before any judge in his jurisdiction  
570 referred to him by the court or judge;

571 2. Supervise and assist all persons within his territory placed on probation, secure, as appropriate and  
572 when available resources permit, placement of such persons in a substance abuse treatment program  
573 which may include utilization of acupuncture and other treatment modalities, and furnish every such  
574 person with a written statement of the conditions of his probation and instruct him therein; *if any such*  
575 *person has been committed to the Department of Mental Health, Mental Retardation and Substance*  
576 *Abuse Services under the provisions of Chapter 9 (§ 37.2-900 et seq.) of Title 37.2, the conditions of*  
577 *probation shall include the requirement that the person comply with all conditions given him by the*  
578 *Department of Mental Health, Mental Retardation and Substance Abuse Services, and that he follow all*  
579 *of the terms of his treatment plan;*

580 3. Supervise and assist all persons within his territory released on parole or postrelease supervision,  
581 secure, as appropriate and when available resources permit, placement of such persons in a substance  
582 abuse treatment program which may include utilization of acupuncture and other treatment modalities,  
583 and, in his discretion, assist any person within his territory who has completed his parole, postrelease  
584 supervision, or has been mandatorily released from any correctional facility in the Commonwealth and  
585 requests assistance in finding a place to live, finding employment, or in otherwise becoming adjusted to  
586 the community;

587 4. Arrest and recommit to the place of confinement from which he was released, or in which he  
588 would have been confined but for the suspension of his sentence or of its imposition, for violation of  
589 the terms of probation, post-release supervision pursuant to § 19.2-295.2 or parole, any probationer,  
590 person subject to post-release supervision or parolee under his supervision, or as directed by the  
591 Chairman, Board member or the court, pending a hearing by the Board or the court, as the case may be;

592 5. Keep such records, make such reports, and perform other duties as may be required of him by the  
593 Director or by regulations prescribed by the Board of Corrections, and the court or judge by whom he  
594 was authorized;

595 6. Order and conduct, in his discretion, drug and alcohol screening tests of any probationer, person  
596 subject to post-release supervision pursuant to § 19.2-295.2 or parolee under his supervision who the  
597 officer has reason to believe is engaged in the illegal use of controlled substances or marijuana or the  
598 abuse of alcohol. The cost of the test may be charged to the person under supervision. Regulations  
599 governing the officer's exercise of this authority shall be promulgated by the Board; and

600 7. Have the power to carry a concealed weapon in accordance with regulations promulgated by the  
601 Board and upon the certification of appropriate training and specific authorization by a judge of a circuit  
602 court.

603 Nothing in this article shall require probation and parole officers to investigate or supervise cases  
604 before general district or juvenile and domestic relations district courts.

605 § 63.2-105. Confidential records and information concerning social services; child-protective services  
606 and child-placing agencies.

607 A. The local department may disclose the contents of records and information learned during the  
608 course of a child-protective services investigation or during the provision of child-protective services to  
609 a family, without a court order and without the consent of the family, to a person having a legitimate  
610 interest when in the judgment of the local department such disclosure is in the best interest of the child  
611 who is the subject of the records. Persons having a legitimate interest in child-protective services records  
612 of local departments include, but are not limited to, (i) any person who is responsible for investigating a  
613 report of known or suspected abuse or neglect or for providing services to a child or family that is the

subject of a report, including multidisciplinary teams and family assessment and planning teams referenced in subsections J and K of § 63.2-1503, law-enforcement agencies and attorneys for the Commonwealth; (ii) child welfare or human services agencies of the Commonwealth or its political subdivisions when those agencies request information to determine the compliance of any person with a child-protective services plan or an order of any court; (iii) personnel of the school or child day program as defined in § 63.2-100 attended by the child so that the local department can receive information from such personnel on an ongoing basis concerning the child's health and behavior, and the activities of the child's custodian; ~~and~~ (iv) a parent, grandparent, or any other person when such parent, grandparent or other person would be considered by the local department as a potential caretaker of the child in the event the local department has to remove the child from his custodian; *and (v) the Commitment Review Committee and the Office of the Attorney General for the purposes of sexually violent predator civil commitments pursuant to Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.*

Whenever a local department exercises its discretion to release otherwise confidential information to any person who meets one or more of these descriptions, the local department shall be presumed to have exercised its discretion in a reasonable and lawful manner.

B. Any person who has not been legally adopted in accordance with the provisions of this title and who was a child for whom all parental rights and responsibilities have been terminated, shall not have access to any information from a child-placing agency with respect to the identity of the biological family, except (i) upon application of the child who is 18 or more years of age, (ii) upon order of a circuit court entered upon good cause shown, and (iii) after notice to and opportunity for hearing by the applicant for such order and the child-placing agency or local board that had custody of the child.

An eligible person who is a resident of Virginia may apply for the court order provided for herein to (a) the circuit court of the county or city where the person resides or (b) the circuit court of the county or city where the principal office of the child-placing agency or local board that controls the information sought by the person is located. An eligible person who is not a resident of Virginia shall apply for such a court order to the circuit court of the county or city where the principal office of the child-placing agency or local board that controls the information sought by the person is located.

If the identity and whereabouts of the biological family are known to the agency or local board, the court may require the agency or local board to advise the biological parents of the pendency of the application for such order. In determining good cause for the disclosure of such information, the court shall consider the relative effects of such action upon the applicant for such order and upon the biological parents.

**2. That the provisions of § 37.2-900 shall become effective on January 1, 2007.**